IN THE SMALL CLAIMS COURT OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 March 2022

CASE No: AIFC-C/SCC/2021/010

ARMAN KUATOV

Claimant

v

PRIVATE COMPANY SERGEK DEVELOPMENT LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Patricia Edwards

ORDER

UPON the commencement of a Claim on 8 November 2021;

AND UPON the filing of a Defence on 22 November 2021;

AND UPON the Court making orders on 20 December 2021 and 3 February 2022;

IT IS ORDERED that:

1. The claim is dismissed in full.

2. No order as to costs.

Court

JUDGMENT

1. On 12 June 2020, the parties signed an Employment Agreement. The agreement was initially for one year of work, commencing on 12 June 2020 (clause 2). Additional Agreement No 1 dated 27 November 2020 reduced the claimant's salary to 200,000 tenge a month from 1 December 2020.

2. By a letter dated 21 April 2021, the claimant asked for unpaid leave to care for a child, from 21 April to 30 December 2021. According to the claim, the claimant made several further requests thereafter, but I have not seen these. The child in question was born on 30 December 2018. (The claimant has since become father to a second child, born on 20 November 2021.)

3. In a letter dated 21 June 2021, the defendant responded "*In accordance with subparagraph 2) of paragraph 6.3 of the Employment Agreement, the Company refuses to give you an unpaid leave to take care of a child until the child reaches the age of three years*".

4. In a further letter dated 8 July 2021, the defendant wrote "*you need to go to work full-time from July 12, 2021*".

5. By a letter dated 23 July 2021, the claimant wrote "*After your refusal to let me to take an unpaid leave to care for a child until the child reaches the age of three, I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*".

6. In a further letter dated Monday 4 October 2021, the claimant said "*after more than 2 months, my application remains not considered, and to date I have not received any response*" and asked for his application to be considered.

7. By a letter dated 12 October 2021, the defendant responded:

   > *"Considering that you are absent from work for a long time without a valid reason (there are relevant acts) and ignore the employer without giving feedback, notifications of going to work were repeatedly sent to your place of residence, which were also ignored by you.*
   >
   > *Your actions on unauthorised dismissal, that is, unauthorised leaving the place of work before the expiration of the established periods after the warning about termination of the employment contract on your own initiative, is also a violation of the Labor Law.*

In this regard, in order to resolve the issue of terminating the labor agreement for positive reasons, you need to come to work and give explanations to the employer about the situation.

Otherwise, the contract will be terminated on the initiative of the employer for negative reasons in accordance with labor law."

8. The claimant did not speak to the defendant as requested. Instead he filed this claim on 8 November 2021. The defendant filed a defence on 22 November 2021. I subsequently made orders permitting further information, documents and witness statements to be filed. The claimant filed further submissions and documents on 18 January 2022. As these were substantial, I considered it fair to allow the defendant an opportunity to respond, which it did on 11 February 2022. The claimant provided final submissions in response on 18 February 2022.

9. The defendant indicated that it would prefer a hearing with its legal representative. The claimant disagreed and said that he would have no representation and would be disadvantaged by a hearing. I consider that the parties have had considerable time to file any submissions and evidence relied upon and it is most appropriate now to proceed to judgment without a hearing.

Issue 1: Was the claimant entitled to unpaid leave?

a. Clause 6.3

10. Clause 6.3 provides:

"6.3 Maternity leave for men

1) The Employee who gives birth to a child and shall be entitled to paid leave of at least 5

working days' duration; this leave shall be paid as normal working days;

2) The Employee who has adopted a child under 3 months old shall be entitled to maternity leave in connection with adoption and shall be entitled to paid maternity leave according to the AIFC Regulations;

The childcare leave may be taken within 2 months from the child's birth;

The childcare leave shall be paid as normal working days;

The Employee may not receive compensation in lieu of leave".

11. The claimant contends, firstly, that clause 6.3 is not applicable at all because of errors of drafting or translation.

12. First, the claimant refers to the title of the sub-clause, "*maternity leave for men*", rather than calling it 'paternity' leave, and the fact it applies to an employee "*who gives birth to a child*", which men cannot do. However, it seems to me sufficiently clear that clause 6.3(1) intends to address leave for men whose child is born (while clause 6.2 provides for "*Maternity leave for women*"). The claimant's interpretation would leave the clause with no purpose at all. As set out in the AIFC Contract Regulations, Regulation 53, "*Contract terms must be interpreted to give effect to all the terms rather than to deprive some of them of effect*".

13. In the alternative, the claimant contends that the part of clause 6.3 relied on by the defendant is not applicable to him.

14. The claimant's case is that the two month limitation applies only in the case of an adopted child. I am unable to accept that argument. It seems to me that the final three paragraphs of clause 6.3 were intended to apply to both subparagraphs (1) and (2) of the clause. All three limitations are readily applicable to both subparagraphs.

15. The first limitation requires leave to be taken "*within 2 months from the child's birth*". As the clause applies to adoption up to 3 months old, on the face of it this limitation applies more squarely to 6.3(1). It might properly be said to mean within two months of the child's birth *or adoption*. In any event, were the two month limitation not applicable to subparagraph (1), then there would be no apparent time limit at all on when the leave could be taken, in stark contrast to the short time limit in the case of adoption.

16. It is true that the second limitation, that the leave is to be paid as normal working days, duplicates the same proviso in subparagraph (1). But that appears to be no more than an inelegance of drafting.

17. Furthermore, the AIFC Employment Regulations includes the following provisions:

> "***39. Paternity leave and pay***
>
> *(1) An Employee who becomes a father to a newly-born child is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period.*

(2) The paternity leave must be taken within 2 months after the day of the child's birth.

(3) During the minimum period of paternity leave under subsection (1), the Employer must pay the Employee at the Employee's normal Daily Wage.

(4) The Employee cannot receive compensation in lieu of paternity leave."

18. The provisions of the contract mirror these provisions closely, which further suggests that they were each intended to apply in all cases, not just in the case of adoption.

19. The claimant also notes that sub-paragraph (1) appears in one box of the contract, while subparagraph (2) appears in a separate box together with the final sentences of Article 6.3. However, looking at other provisions of the contract, they are not always divided perfectly into such boxes (e.g. clauses 1.3 and 4.3), and to rely on these as changing the interpretation of the provisions would seem to me to attach undue significance to this feature of the drafting.

20. Accordingly, in my judgment, the claimant was not entitled to paternity leave under these provisions.

b. Article 100

21. The claimant argues that Article 100 of the Labour Code of the Republic of Kazakhstan is "*of a superior legal power over clauses of Employment Agreement*". Article 100 provides:

*"**Article 100. Unpaid leave for child care until he reaches the age of three***

1. The employer is obliged to grant an unpaid leave to the worker for childcare until he reaches the age of three:

1) at the choice of the parents - the mother or the father of the child;

[…]

2. An unpaid leave for child care until the age of three is granted on the basis of a written application of the employee with indication of its duration and provision of a birth certificate or other document confirming the birth of the child.

The employee can use the leave to take care of the child until he reaches the age of three years in full or in parts. […]"

22. Article 8 is entitled "Scope of this Code" and includes the following:

"2. This Code applies to employees, employees of the sending party, employers, as well as the receiving party, which are located on the territory of the Republic of Kazakhstan … unless otherwise provided by the laws of the Republic Kazakhstan …

…

4. Laws of the Republic of Kazakhstan shall not reduce the level of rights, freedoms and guarantees established by this Code."

23. The claimant relies on Regulation 3 of the AIFC Employment Regulations, which states that the Regulations "*provide minimum employment standards for Employees who are based in, or ordinarily work in or from, the AIFC*".

24. As set out above, Regulation 39 provides that a new father "*is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period*".

25. The claimant further relies on Article 4(1)(3) of the AIFC Constitutional Statute:

"***Article 4. Acting Law of the AIFC***

1. The Acting Law of the AIFC is based on the Constitution of the Republic of Kazakhstan and consists of: …

1) this Constitutional Statute; and

2) AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and

3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts".

26. It can be seen from this that the Labor Code of Kazakhstan applies to matters "*not governed*" by the AIFC Acts. However, paternity leave is governed by the AIFC Employment Regulations.[1] There is therefore no scope for the application of Article 100. The claimant was not entitled to paternity leave on this basis either.

[1] Article 1(4) provides that "*AIFC Act means an official written document, adopted by an AIFC Body, relating to the relationships between AIFC Participants, AIFC Bodies, their Employees, AIFC Participants and AIFC Bodies, AIFC Participants and their Employees or Employees of AIFC Bodies, AIFC Bodies and their Employees or Employees of AIFC Participants*". Accordingly, the AIFC Employment Regulations are an AIFC Act.

Issue 2: Was the defendant obliged to pay the claimant's salary?

27. The claimant wrote to the defendant on 21 April 2021 asking for paternity leave to start the very same day. It appears to be common ground between the parties that the claimant has done no work since then. The last payment of salary was made on 5 May 2021.

28. The claimant is correct that the contract provides for salary to be paid in full and on time (clauses 4.1(8), 4.4(6), 5.2). Regulation 20 of the AIFC Employment Regulations provides that deductions from wages may only be made in limited circumstances, including if authorised "*under legislation that applies in the Astana International Financial Centre or under the Employee's Contract of Employment*".

29. However, the obligation to pay salary is contingent on an employee working. The principle is sometimes expressed as one of "*no work, no pay*". This can be seen, for instance, in the decision of the House of Lords in Miles v Wakefield [1987] IRLR 193.[2] The claimant stopped working after expressing his desire to take paternity leave, to which he was not in fact entitled. The defendant was therefore entitled to stop paying his salary for so long as the claimant remained unwilling to work.

30. The same result can also be reached by looking at Regulation 79 of the AIFC Contract Regulations:

> *"79. Withholding performance*
>
> *(1) If the parties are to perform simultaneously, either party may withhold performance until the other party tenders performance.*
>
> *(2) If the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."*

31. Payment of salary followed work by the claimant. The claimant did not work and therefore the defendant was not obliged to pay.

[2] Pursuant to Article 13(6) of the AIFC Constitutional Statute, final judgments of the courts of other common law jurisdictions may be taken into account in this court.

Issue 3: Disputes in relation to the workplace

32. The pleadings raise various issues as to whether the claimant was required to work in an office, whether a suitable workplace was provided for the claimant, and whether the defendant requested the claimant to go to the office contrary to one or more Resolutions of the Chief State Sanitary Doctor of the City of Nur-Sultan.

33. Clause 1.3 of the contract provides "*The place of execution of work under this Agreement: NurSultan city*". The claimant says he did not attend an office for his entire period of work, from June 2020, and was never disciplined for this. He says the first time the defendant raised the issue was in July 2021. The defendant has not disputed that the claimant never worked from an office, nor provided any details of where else the claimant should have worked.

34. The defendant's letter of 8 July 2021 said "*you need to go to work full-time from July 12, 2021*". It is not clear from this short letter that this was actually a requirement to work from a particular location, rather than simply a request for the claimant to resume working as he had been doing.

35. The defendant's letter of 12 October 2021 asked the claimant to come to work to explain the situation in order the resolve the issue of terminating the contract, as requested by the claimant. The defendant has said in these proceedings that the claimant was asked to attend the office for his proper dismissal and "*to transfer projects under his management, documentation and materials on work projects to colleagues, as well as transfer of inventory items, if any*". This echoes clause 4.2(16), which provides that in the case of any termination, whatever the reason, the claimant must transfer to the defendant documents, files, passwords and equipment, at least 3 working days prior to the date of termination. In the event, the claimant did not discuss termination further with the defendant following that letter.

36. In the circumstances, I am unable to conclude that the claimant was required to work in any particular office or that he violated any requirement to do so. Equally, the claimant seems content for the defendant not to have provided a physical place of work. The parties appear to have proceeded from the outset of the contract on the basis that the claimant would work from home

and did so. Neither party has established any actionable breach of contract in relation to these workplace issues.

Issue 4: Termination

37. The claimant seeks an order requiring the defendant to terminate the agreement.

38. The duration of the contract is addressed in clause 2:

> *"2.1 The Agreement is concluded for 1 year.*
>
> *2.2 The date of commencement of work: June 12, 2020.*
>
> *2.3 Upon expiry of the Agreement, the Parties shall be entitled to extend it for an indefinite or fixed term of at least one year. In case of expiration of the term of the labor agreement, if*
>
> *neither party has notified in writing about the termination of the employment relations during the last working day (shift), the Agreement is considered to be extended for the same period as it was previously concluded, except for the cases provided by the AIFC Regulations, the Code of Ethics."*

39. As neither party sent a notification of termination before the end of the first year, on 12 June 2021 the agreement was automatically extended for a further year.

40. The contract might terminate before that period expires if either party chooses to terminate following a material breach by the other. That has not happened.

41. The first mention of termination was in the claimant's short letter of 23 July 2021, which said "*I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*". It is not entirely clear on what basis the claimant sought to terminate. Clause 10.4 provides:

> *"In the event of termination of this Agreement on its own initiative, the Employee shall be obliged to notify the Employer in writing not later than 1 (one) calendar month in advance, and during this period, the Employee shall:*
>
> *- reimburse losses, if they were caused to the Employer by the Employee, - pay all kinds of debts to the Employer, - finish the work started".*

42. However, the claimant did not give a month's notice; nor is there any suggestion of doing any of the things listed in the clause.

43. Alternatively, the parties can agree earlier termination. This appears to be what the claimant was contemplating: his letter of 23 July asked the defendant to terminate, and his letter of 4 October asked the defendant again to consider the claimant's application. Termination by agreement is addressed in clause 10.5, which provides that one party may send a notice to the other, who should respond within three working days. Although the defendant did not respond to the claimant's first request, it could have simply declined. The defendant did eventually respond on 12 October, asking the claimant to meet to discuss possible termination. The claimant did not do so, but proceeded to commence this litigation. No agreement to terminate the contract was reached.

44. Accordingly, the employment contract remains in force. Under a contract of employment the parties have mutual obligations to be ready, willing and able to work, and to be ready, willing and able to pay wages. As noted in the context of Issue 2 above, the non-performance of one obligation excuses performance of the other. However, that does not mean that the contract ceases to exist if either is not performed. It simply means that the particular obligation is suspended until the other mutual obligation is performed.

45. I note that an agreed termination does not appear to be beyond contemplation. The defendant's position seems to be that it simply wants to ensure that termination of the contract happens legally and properly, with a complete transfer of projects, documents and materials. Both parties have expressed willingness to terminate the contract; it is to be hoped that they can resolve this between themselves.

Issue 5: Damages

46. As I have found that the defendant was not in breach of contract or obliged to pay the salary, the claimant has no entitlement to recover any damages.

47. It might be noted that, if the defendant had granted paternity leave, then the claimant would in any event have done no work, and earned no money, for the period between April and December 2021. He has suffered no loss of income and would have incurred the same expenditure either way. The claimant's substantial claim is somewhat surprising in circumstances where what he sought, and in fact achieved, was neither to work nor be paid during the remainder of the year.

48. Insofar as the claimant's further submissions make reference to his salary in the months prior to April 2021, this forms no part of the claim filed in this action and there is in any event insufficient

evidence of any issue with the payments. The claimant's suggestion that his 200,000 tenge salary was unfairly imposed is difficult to reconcile with the lack of evidence of any complaint by the claimant, the fact that he signed the Additional Agreement No 1,[3] and the fact that he did not terminate the contract before it renewed in June 2021 – despite his submission in this case that he could have found another job with a salary of 1,500,000 tenge; that is some 7.5 times the amount of the salary agreed in November 2020.

Conclusion

49. For the reasons above, the claim falls to be dismissed in full. The defendant is not obliged to terminate the contract of employment nor to pay any damages to the claimant. Pursuant to Rule 26.9, I do not consider it appropriate to make any order as to costs.

By the AIFC Small Claims Court,

Patricia Edwards,
Justice, AIFC Small Claims Court

Representation:

The Claimant was not represented

The Defendant was represented by:

[3] The claimant refers to Article 46 of the Labor Code of Kazakhstan to say that the defendant should have given 15 days' notice of the change in salary. That provision deals with changes in working conditions and makes no mention of pay. In any event, as noted in the context of Issue 1 above, the Acting Law of the Republic of Kazakhstan applies in part to matters not governed by AIFC Acts. The AIFC Contract Regulations provide in Regulation 10 that a contract "*can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Regulations*". Clauses 10.1 and 12.2 of the contract provide for amendments to be made by a written additional agreement, as happened in this case.

1. Mr. Daniel Muzapbar, Korkem Telecom LLP; 2.
   Mr. Askar Issayev, Korkem Telecom LLP.